Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period
October 1 through December 31, 2003

Table of Contents

The Quarterly Report

The Workplace Safety and Insurance Appeals Tribunal ("WSIAT" or "Tribunal") considers appeals from final decisions of the Workplace Safety and Insurance Board ("WSIB" or "the Board") pursuant to the *Workplace Safety and Insurance Act, 1997* ("the Act"). The Act, replacing the *Workers' Compensation Act*, came into force January 1, 1998. The Tribunal is a separate and independent adjudicative institution. It was formerly known as the Workers' Compensation Appeals Tribunal, until the name was changed pursuant to section 173 of the Act.

This Report provides a summary of the Tribunal's activities and achievements of the past quarter, October 1st through December 31st, 2003. It provides an update on caseload inventory and the Tribunal's community involvement. Also provided is a summary of judicial review activity and recent decisions.

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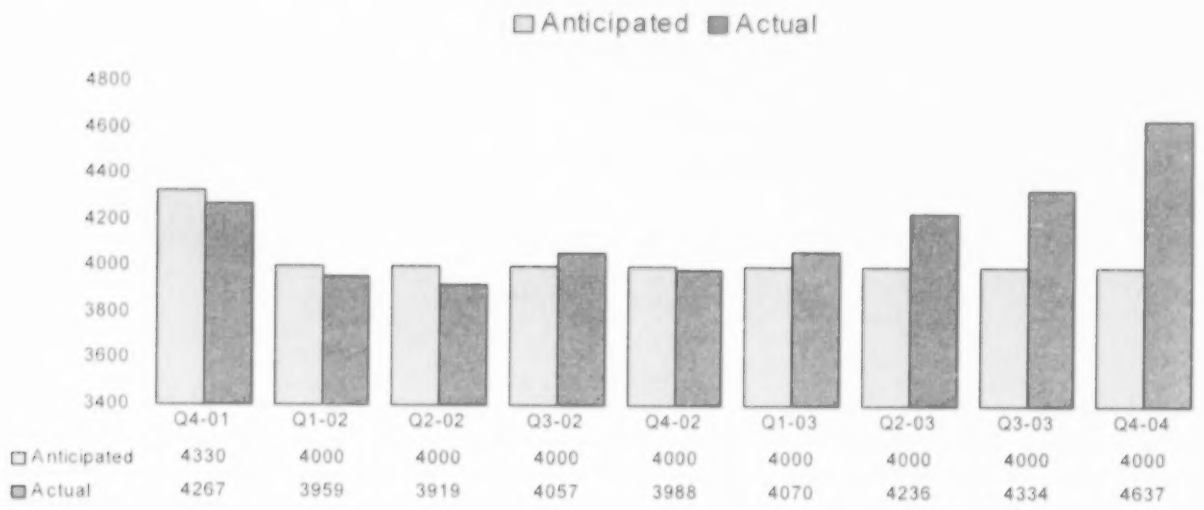
Key Tribunal Activities

A) Tribunal Production

Productivity in Relation to Case Management Objectives



	Q4-01	Q1-02	Q2-02	Q3-02	Q4-02	Q1-03	Q2-03	Q3-03	Q4-04
Anticipated	4330	4000	4000	4000	4000	4000	4000	4000	4000
Actual	4267	3959	3919	4057	3988	4070	4236	4334	4637

Figure 1. Appeals Inventory, Anticipated vs. Actual

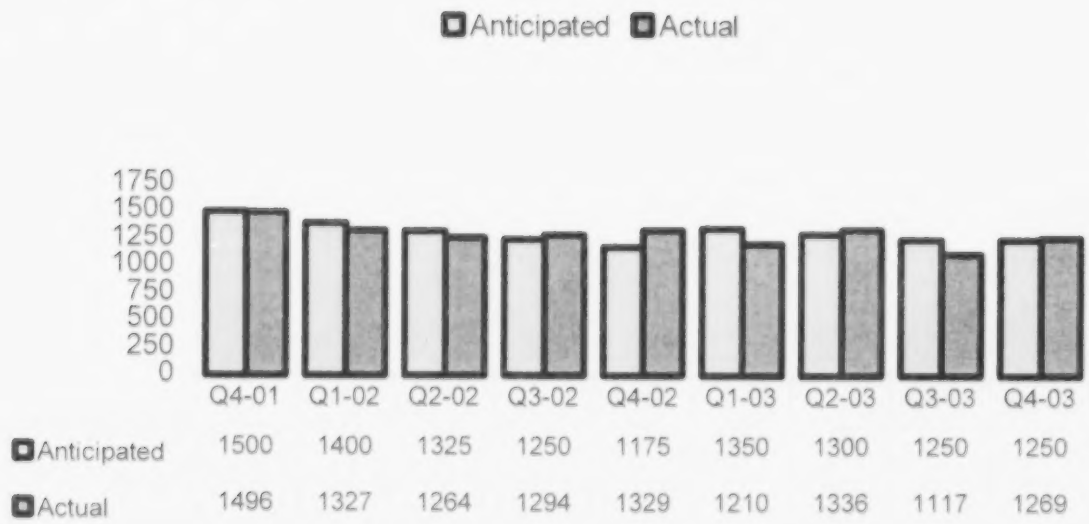


Figure 2. Incoming Appeals, Anticipated vs. Actual

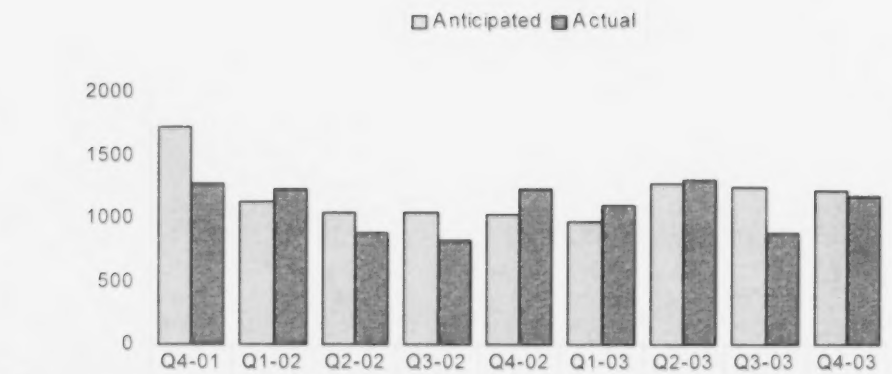


Figure 3. Dispositions, Anticipated vs. Actual

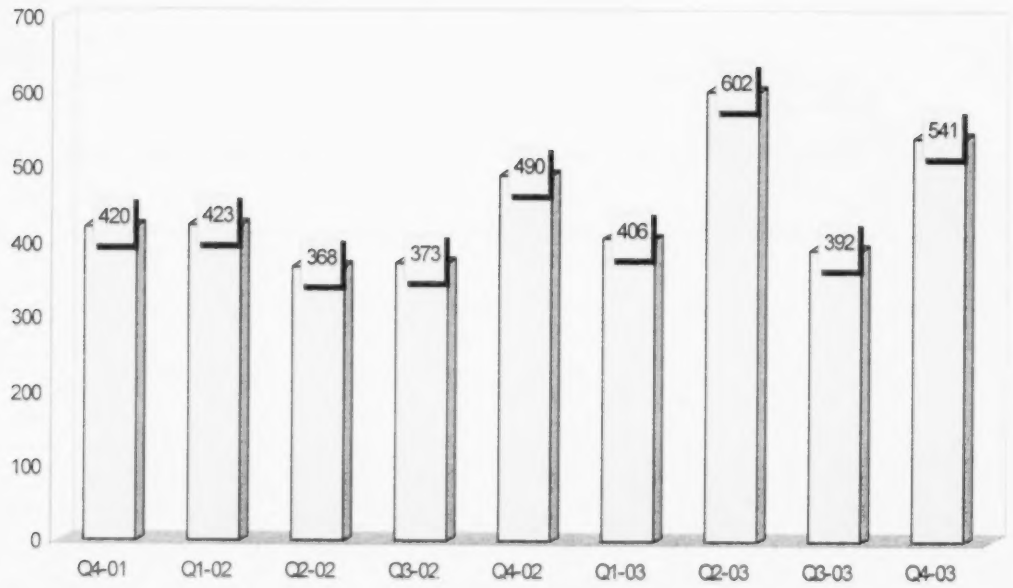


Figure 4. Dispositions from Pre-Hearing processes

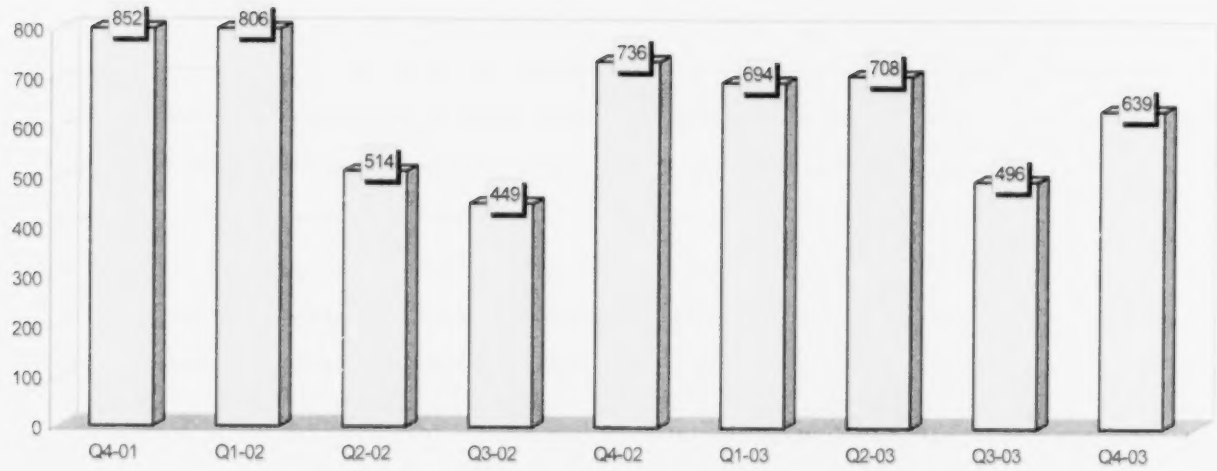


Figure 5. Dispositions from After Hearing processes.

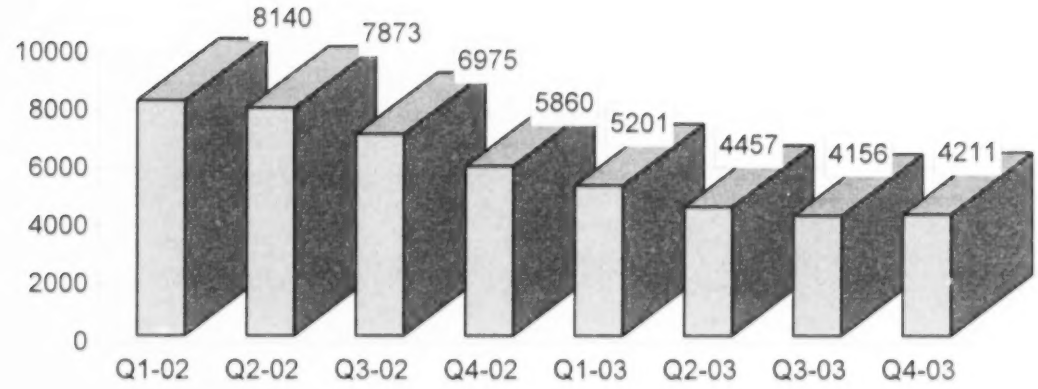
Inactive Inventory: At the close of the fourth quarter 2003, the Tribunal's inactive inventory numbered 4,217, an increase of 53 cases from the previous quarter.

During the 4th quarter, 136 appellants contacted the Tribunal to continue or re-activate their appeal, representing 3% of the previous quarter's inactive inventory of 4,153. In the fourth quarter of 2003 deactivations numbered 265 cases. These figures, in addition to the cases through the inactive inventory reduction project, resulted in a net inactive inventory increase of 52 cases.

During the quarter, 20 of the above-noted reactivations involved cases in the inactive inventory reduction project. Reactivations have been accounted in the Tribunal's business planning, and expected reactivations are included in projections as incoming appeals.

Inactive status, introduced in 1997, as a case management approach to provide appellants with time to prepare their appeal prior to hearing. This process is subject to the Tribunal's Practice Direction on Inactive Files.

Over 50% of the inactive cases are over 2 years old. At the end of 2002, the Tribunal reported that 66% of cases in inactive status were over 2 years old. It is unlikely that these appellants are planning to proceed with their appeal.



Inactive Inventory Q1 2002 to Q4 2003

B) Communications

C) Judicial Review Activity

D) Highlights of Decided Cases

Decision No. 1551/02, in the context of a claim for benefits for Chronic Obstructive Pulmonary Disease (COPD), considered the status of a Board document titled "Adjudicative Advice: Chronic Obstructive Pulmonary Disease" dated April 2001, which was submitted by the Official of the Worker Adviser, the representative of the worker's estate. The Vice Chair noted that the "Adjudicative Advice" document was extremely comprehensive in that adjudicators not only to look at such factors as the worker's smoking habits but also the worker's occupational history as well. On application from the Vice Chair, the Tribunal contacted the Board as to the status of this document. The Board confirmed that the document would have been used to adjudicate this claim, if it had been filed after the document came into effect. The Appeal Resolutions Officer decision on appeal in this case pre-dated the date of this document.

After finding the worker had entitlement to COPD, the Vice Chair remitted to the Board the question of the apportionment of benefits in relation to the worker's smoking history. The worker's representative requested that no decision be made respecting apportionment. The Vice Chair, after referring to Decision No. 353/02, which provided a review of the law of apportionment, found that the apportionment issue was not before the Tribunal in this appeal.

Decision No. 600/97 considered a number of medical-legal issues that arise in claims for benefits for occupational disease, such as the meaning of the terms "statistically significant" and "standardized incidence ratio" (SIR) used in the medical literature as well as the use of Standardized Incidence Ratios as evidence in adjudicating causation issues.

This particular appeal concerned a claim for benefits for rectal cancer, which was argued to have arisen from the worker's 31-year history as a nickel miner. At the hearing the Panel questioned two doctors who had co-authored a study prepared for the Ontario Occupational Disease Panel in January 1990, titled "A Study of Cancer Incidence in Ontario Nickel Workers". The study provided risk estimates of colo-rectal cancer for unionized miners working at certain mines, including the mine that the employed the worker.

The Panel found that the study did not draw any definitive conclusions about whether nickel miners have an increased risk of developing colo-rectal cancer and decided that it had not been shown, on a balance of probabilities, that the worker's cancer arose out of his employment.

Board "amicus curiae" submissions

Decision No. 1745/03 found that there were valid reasons to use the pre-hearing process in complex cases in which it was expected that various parties or witnesses might be helpful. The Panel noted that the process of obtaining Board submissions was at the Tribunal's initiative in order to obtain further assistance to clarify the record in complex cases. Parties are given the opportunity prior to the hearing to object if they are concerned at being put the "amicus curiae" role. Also, there was no impropriety for an administrative body to take such an initiative and offer assistance to parties in order which the Tribunal has the discretion to receive or dismiss.

In this case the Panel also commented on the role of the Tribunal Counsel Office, noting its role to provide the Tribunal Panel or Vice Chair with all relevant materials and submissions prior to the hearing. The Office of the Vice Chair had the related role of increasing the availability of matters at the pre-hearing stage to avoid post-hearing delays. The consideration then of how and when amicus curiae submissions might be received in an individual case is appropriately considered in the context of the role of Tribunal staff in general in the pre-hearing preparation of a file.

Tribunal Jurisdiction to Take Away Rights of Action under section 267.8 of the *Insurance Act*

In *Decision No. 234/03*, the worker had elected to receive benefits under the Act and his Schedule 2 employer was claiming relief of contribution in the worker's civil action. The applicants in a right to sue application submitted that the employer could not extinguish the rights of an employer under section 267.8(17) of the *Insurance Act*. The applicants also relied Board policy, OPM Documents 11-01-15 which also provides that a Schedule 2 employer does not have a right to bring an action on behalf of a worker who has elected to receive benefits under the Act as a result of a motor vehicle accident occurring after October 31, 1990.

The Vice Chair reviewed court decisions submitted by the applicant in particular *Cotton v. Lamb* and *Sabo v. Ont (Work)*, distinguishing them from the facts in this case, as the issue in this case was the effect of the reimbursement agreement with the Schedule 2 employer and not the re-election.

The Vice Chair found that, unlike the courts, the Tribunal did not have jurisdiction to rule whether the *Insurance Act* took away the right of action of the plaintiff, relying on *145/95*, which found that the Tribunal did not have jurisdiction to limit rights of action under section 267 of the *Insurance Act*. While the Tribunal may interpret a statute, which is involved in the issues before it, it can only do so in the proper exercise of its own jurisdiction.

CPP Deductions to FEL Benefits and Board Policy

In Decision No. 1306/02/I, the Vice-Chair found that Board policy that allows for the deduction of CPP benefits from a partial FEL was not inconsistent with the Act.

In that prior decision, *Decision No. 1306/02/I*, the Vice-Chair reviewed the Board's policy on the calculation of "net average earnings" and questioned whether it was permitted by the Act. Section 43(3) of the pre-1997 Act provides that the FEL award is the difference between pre-injury and post-injury net average earnings that a worker is likely to earn in suitable and available employment. Section 43(7) provides that in setting the FEL award the Board is to have regard to CPP benefits received by the worker.

The Board *Operational Policy Manual*, Document #05-05-05 provides that where a worker does not have post-injury earnings:

1- pre-injury net average earnings are to be determined;
2- a vocational objective and the likely earnings in that employment are to be identified;
3- the likely post-injury net average earnings are to be calculated and
4- CPP benefits received by the worker are to be added to that sum.

This sum becomes the "deemed earnings" of the worker and is treated as the worker's post-injury net average earnings for the purposes of calculating the FEL award. Document #05-05-06 provides that "deemed earnings" are to be treated in the same manner as actual post-injury earnings for the purposes of section 43.

In the subsequent decision, *1306/02/2*, the Vice Chair received submissions from the Tribunal Counsel Office, which canvassed the two major lines of cases represented by *Decision No. 2792/00* and *Decision No. 199/00*. The submissions preferred the approach taken in *Decision No. 2792/00*, as more subsequent decisions followed that case. Also that case raised significant questions about the correctness of *Decision No. 199/00*.

The Vice Chair then found that the Board policy in Documents # 05-05-05 and 05-05-06 was consistent with the Act.

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